Supreme Court, U.S.
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No. 01-631

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

CHRISTOPHER DRAYTON AND CLIFTON BROWN, JR.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTION PRESENTED

Whether three police officers, who boarded a bus solely to obtain consent to search passengers and their bags, and who sought consent through one officer's "in your face" show of authority, a second officer assisting his search, and a third officer kneeling in the driver's seat watching passengers, but who never advised passengers of their rights to ignore officers, and to refuse to have their carry-on bags searched and their "groin areas" frisked, violated the passengers' Fourth Amendment rights?

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SCHOLARLY AUTHORITIES

Adrian J. Barrio, Note, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent*, 1997 U. Ill. L. Rev. 215	36
Thomas Blass, *Understanding Behavior in the Milgram Obedience Experiment: The Role of Personality, Situations, and Their Interactions*, 60 J. Personality & Soc. Psychol. 398 (1991)	36
D.L. Bolinger, *Intonation and its uses: melody in grammar and discourse* (1989)	42

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J. M. Burger, *The foot-in-the-door compliance procedure: A multiple process analysis and review*, 3 Personality & Soc. Psychol. Rev. 303 (1999)	38
Dennis J. Callahan, Note, *The Long Distance Remand: Florida v. Bostick and the Re-Awakened Bus Search Battlefront in the War on Drugs*, 43 Wm. & Mary L. Rev. 365 (2001)	36
H.H. Clark, *Responding to indirect speech acts*, 11 Cognitive Psychol. 430 (1979)	42
J. Dillard, *The current status of research on sequenial-request compliance techniques* 17 Personality & Soc. Psychol. Bull. 283 (1991)	38
L. Festinger & J. M. Carlsmith, *Cognitive Consequences of Forced Compliance*, 58 J. Abnormal & So. Psychol. 203 (1959)	38
J.L. Freedman & S.C. Fraser, *Compliance Without Pressure: The Foot-In-The-Door Technique*, 4 J. Personality & Soc. Psychol. 195 (1966)	38
J.R.P. French, Jr. & B. Raven, *The Bases of Social Power, in Studies in Social Power* 150 (D. Cartwright ed., 1959)	36
R.W. Gibbs, *Do people always process the literal meaning of indirect requests?* 9 J. Experimental Psychol.: Learning, Memory, & Cognition 524 (1983)	42
E.T. Hall, *The Silent Language* (1959)	33
T. Holtgraves, *Communication in context: Effects of speaker status on the comprehension of indirect requests*, 20 J. Experimental Psychol.: Learning, Memory, & Cognition 1205 (1994)	42
F.E. Inbau et al., *Criminal Interrogation and Confessions* (3d ed. 1986)	33

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Dorothy Kagehiro, *Perceived Voluntariness of Consent to Warrantless Police Searches* 18 J. Applied Soc. Psychol. 38(1981)	43
S.D. Kelly et al., *Offering a hand to pragmatic understanding: The role of speech and gesture in comprehension and memory*, 40 J. Memory & Language 577 (1999)	42
E. J. Langer, *Rethinking the role of thought in social interaction, in* 2 *New Directions in Attribution Research* 36 (J. H. Harvey et al. eds., 1978)	38
S. Milgram, *Behavioral Study of Obedience*, 67 J. Abnormal & Soc. Psychol. 371 (1963)	36
S. Milgram, *Obedience to Authority: An Experimental View* (1974)	36
Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process, in Advances in Experimental Social Psychology* 173 (Leonard Berkowitz ed., 1977)	43
R.C. Schank & R. P. Abelson, *Scripts, plans, goals, and understanding* (1977)	38
R. Sommer, *Personal Space: The Behavioral Basis of Design* (1969)	33
Stern et al., *Supreme Court Practice* (7th ed. 1993)	3
M. Zachary, *Supreme Court Revisits Searches Of Bus Passengers*, 2002 Lawyers Weekly USA 229 (Apr. 1, 2001)	36

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FBI, *Legal Handbook for Special Agents*	26
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INTRODUCTION*

This case addresses the proper circumstances under which police can randomly board passenger buses for the purpose of obtaining "consent" to search passengers' carry-on luggage and persons, including their groin area, without violating the Fourth Amendment. This case focuses on whether a reasonable person would feel "free to ignore" police officers who seek consensual encounters with the citizen, who choose to do so in the cramped confines of a bus, and who seek to search both carry-on bags as well as passengers' bodies. Whether passengers have been advised that they can ignore the officers and refuse consent for such searches remains an important factor in the totality of the circumstances test.

A reasonable passenger could not ignore the "in your face" show of authority which officers employed in this case. That the officers' behavior was not the same as an encounter with another passenger is amply demonstrated by the fact that a reasonable person would have told another passenger to "back off" shortly after the person stood behind them, leaned close to their face, and started talking. The critical, if not only, distinction avoiding the same passenger response here was the officer's "show of authority," that is, the fact that he was a police officer. The officers chose and exploited a coercive environment in which they knew they were most likely to get the consent they sought.

If officers truly want to conduct "voluntary" searches, of passengers seated in the cramped confines of a bus, they should ask for volunteers. Looking at the issue in this light makes clear that no reasonable person would volunteer, or make a free choice, to have his groin area searched by a stranger, police officer or not. It would be entirely

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* Counsel gratefully acknowledges the invaluable contributions of Mr. Dennis Callahan, J.D. candidate at William and Mary College of Law.

unreasonable to have a constitutional principle based upon such a standard. The record before this Court makes clear that respondents did all a reasonable person could do under the circumstances to ignore the police officers, and the officers chose to construe that as consent. In any event, Drayton's silence cannot be construed as anything more than mere acquiescence to authority.

STATEMENT OF THE CASE

1. On February 4, 1999, respondents were passengers on a Greyhound bus traveling from Fort Lauderdale, Florida, to Indianapolis. See bus tickets, Govt. Trial Ex. 3. Both had checked luggage, and Brown had a carry-on bag. J.A. 111 (Tr. 83).[1] About Noon, the bus made a scheduled stop at the Greyhound bus terminal in Tallahassee, Florida. Respondents and other passengers were required to exit the bus. J.A. 104 (Tr. 75-76).

The Tallahassee Police Department ("TPD") Drug Interdiction Team generally goes to the bus station twice daily, at 5:00 a.m. and Noon, to intercept buses arriving from South Florida. J.A. 69 (Tr. 37-38). On this date, the three officers, Lang, Blackburn, and Hoover, arrived before Noon and watched passengers deboard the arriving buses. J.A. 103 (Tr. 75). The officers had a drug dog with them, J.A. 136 (Trial Tr. 11), but no testimony revealed the dog's role. They first saw respondents about Noon. J.A. 139 (Trial Tr. 14).

As respondents reboarded, the driver collected their tickets, J.A. 77 (Tr. 47), while the officers observed. J.A. 105 (Tr. 76). There were approximately 25-30 passengers on the 47-

[1] "Tr." refers to the transcript of the March 16, 1999, suppression hearing. The only witness was Officer Lang of the Tallahassee Police Department. "Trial Tr." refers to the transcript of Drayton's trial.

passenger bus.[2] J.A. 79, 102 (Tr. 49, 73). Once passengers were seated, the driver left to complete the departure process. J.A. 77-78 (Tr. 47-48). The driver turned the bus over to the three officers, saying something like, "It's all yours." *Id.*; J.A. 108-09 (Tr. 80).

Respondents' bus was scheduled to depart at 12:45 p.m. Govt. Trial Ex. 3. At approximately 12:40 p.m., after passengers were seated,[3] J.A. 108 (Tr. 80), the three officers boarded the bus for the purpose of obtaining consent to search luggage and passengers.[4] J.A. 42, 49, 55 (Tr. 10, 16, 24).

[2] Respondents have lodged with the Clerk interior measurements and photographs of this type bus. *See* Stern et al., *Supreme Court Practice* 556 (7th ed. 1993).

[3] The district court stated "the only testimony I heard here was that . . . they got on right with the passengers, so they could have been mistaken for other passengers." J.A. 126 (Tr. 100).

[4] The bus search conducted in this case was part of TPD's routine drug interdiction searches at the Tallahassee bus station. J.A. 42 (Tr. 10). Lang testified his team has conducted such searches for three years, *id.*, up to six or seven buses a day, J.A. 80 (Tr. 49), four or five days a week, J.A. 80 (Tr. 50). Conservatively, they had boarded buses carrying 78,000 passengers in that period. J.A. 80, 118 (Tr. 49, 90-91).

Lang testified it is very rare for passengers to decline to be searched. In the past year, only "five or six people" had so declined. J.A. 81 (Tr. 51). He agreed that is "not very many." *Id.* Indeed, given the number of buses searched and the number of passengers on each bus (25-30), that is an extremely small percentage of refusals, less than 1/100th of 1%. J.A. 118 (Tr. 91). Lang agreed "the overwhelming majority of these people feel it is their duty to cooperate with [him]" and therefore "cooperate." J.A. 99-100 (Tr. 70-71).

The prosecutor acknowledged that "[o]ne reason for [Lang's] success is his audience. People on buses are . . . there because they're generally economically disadvantaged . . . They need to go somewhere, and that's the only way they have to get there." J.A. 39 (Tr. 5-6).

Lang also testified that "usually [passengers] are some (sic) confrontational when they say, 'No, you're not going to search my stuff.'" J.A. 98 (Tr. 69).

They did not have warrants, probable cause, or reasonable suspicion. J.A. 83-84, 113 (Tr. 53-54, 85). If he wanted to "check" a particular bag or person, Lang endeavored to obtain consent. J.A. 49-50, 99 (Tr. 18, 69-70).

Lang specifically matched passengers with carry-on luggage: "I make sure that I put a piece of luggage, which is above them, with everybody." J.A. 50, 140, 52 (Tr. 17, 20); Trial Tr. 15-16.

The officers displayed their badges, usually on chains around their necks, or sometimes in their hands. J.A. 139 (Trial Tr. 14). They were wearing plain clothes. J.A. 43-44 (Tr. 11-12). All wore guns in side holsters, covered by shirts hanging out or jackets. J.A. 43, 76-77 (Tr. 11, 46). They had handcuffs. J.A. 45, 65 (Tr. 12, 34).

Hoover boarded the bus first and "kne[lt] in the driver's seat looking over the [plexiglass] back" to watch passengers' reactions. J.A. 45, 89-91 (Tr. 12-13, 60-61). Passengers could see him. J.A. 46 (Tr. 14).[5] Hoover reported to Lang if someone obviously reacted to Lang's presence. J.A. 101-02 (Tr. 72-73).

Blackburn and Lang entered behind Hoover and walked to the back of the bus. J.A. 47 (Tr. 14). The officers did not make any general announcement identifying themselves or explaining what they were doing on the bus. J.A. 48 (Tr. 15-16). Nor did the officers at any time inform passengers they had a right to refuse to talk to the officers, to have their bags searched, or to be frisked. J.A. 81, 93 (Tr. 51, 67).

At the back of the bus, Blackburn and Lang "work[ed] from the back of the bus forward" as a team. J.A. 47-49, 94 (Tr. 15-16, 65). While Lang observed, Blackburn spoke to the passenger in the very rear seat, "identif[ying] himself and obtain[ing] consent . . . to check[] his luggage." J.A. 47, 49

[5] Lang's trial testimony implied that Hoover remained *outside* the bus door. J.A. 140 (Trial Tr. 15).

(Tr. 14, 16). That passenger's carry-on bag was searched, but no contraband was found. J.A. 49 (Tr. 17).

Lang then began working forward, with Blackburn observing and assisting; Lang talked with the passenger in the next seat forward, but "decided [he] didn't want to check [him]." *Id.* Lang moved to the passenger across the aisle, identified himself, "asked for consent and . . . was given consent to check his luggage." That passenger's bag was searched, but no contraband was found. J.A. 50-51, 53 (Tr. 17-19, 21).

Lang then approached respondents, seated on the driver's side of the bus. Drayton was in the aisle seat, and Brown by the window. J.A. 52-54 (Tr. 19-22). Lang conceded he had no probable cause or reasonable suspicion. J.A. 83-84 (Tr. 53-54).

Lang stood "with his back to the rear of the bus and facing the front of the bus and approaching them from over [Drayton's] right shoulder." J.A. 55-56 (Tr. 23-24). An overhead luggage rack extended over both seats, requiring the inside passenger to duck his head to stand up or get out. J.A. 55 (Tr. 23). If someone wanted to get off, Lang "turn[ed] to the side and let them come past." J.A. 68 (Tr. 37).

Lang's face was "12 to 18 inches" from Drayton's and "a couple of feet over from Mr. Brown." J.A. 57 (Tr. 25). He agreed with the district court's characterization that his style was "kind of 'in your face.'" J.A. 56 (Tr. 25).[6] His "total focus" is on one passenger. J.A. 51 (Tr. 19).

[6] The government asserts the testimony "makes it clear that [Lang] thought he was being asked whether he spoke with respondents *face-to-face*, which he did." Govt. Br. 19 n.2 (emphasis in original). That is clearly not correct. The testimony does not reveal what Lang *thought* he was being asked, only that he agreed he used an "in your face" style. In any event, the government's attempt to "explain" Lang's testimony is untenable. Lang also agreed with the district court that he was "*not* . . . face to face" with respondents. J.A. 56 (Tr. 24) (emphasis added).

His tone of voice was intended to be heard only by the passenger being addressed, J.A. 51-52 (Tr. 19-20), but his tone demonstrated at the suppression hearing "carr[ied] for a considerable distance." J.A. 57 (Tr. 26).

His face so close to Drayton's, Lang testified he held up his badge to show "that [he is] the authority." J.A. 58, 77, 98, 115 (Tr. 26, 45-46, 69, 87). He announced:

> I'm Investigator Lang out of Tallahassee Police Department. We're conducting bus interdiction, make (sic) sure there's no weapons or drugs on the bus. We would like for (sic) your cooperation. Do you have any luggage on the bus?[7]

J.A. 82, 110 (Tr. 52-53, 82); see also J.A. 55-56 (Tr. 23-24). Lang never asked – as a question – whether they would cooperate. J.A. 93-94 (Tr. 64). "I tell them who I am, *what I am doing.*" J.A. 98-99 (Tr. 69-70) (emphasis added).

Although Lang expressed ambivalence whether both respondents pointed to a green bag on the overhead rack, he appeared to settle on Brown: "So [Brown] was the one pointing." The bag belonged to Brown. J.A. 55-57 (Tr. 24-25). Lang said, "Do you mind if I check it?" J.A. 56 (Tr. 24). Brown said, "Go ahead." *Id.*

Rather, he emphasized he leaned over them from behind so he would not block the aisle.

[7] Lang testified to slightly different phraseology at several points, but twice included the phrase, "We would like for your cooperation," before asking if they had any carry-on luggage. J.A. 55, 82 (Tr. 23-24, 52). The prosecutor noted that "Frankly, the fewer things you ask people to do, the more likely they are to do them. As quickly as possible he gets to the point of can he search their luggage or . . . their person or both." J.A. 38 (Tr. 5). Consistent with this knowledge, Lang does not ask for passengers' tickets, identification, or names. J.A. 50 (Tr. 18). In fact, he testified passengers do not like giving out their names. J.A. 88-89 (Tr. 59).

Lang retrieved the bag and handed it to Blackburn, who searched it. No contraband was found. Pet. App. 4a; J.A. 56, 59-61 (Tr. 24, 27-29).

Lang testified at the suppression hearing that he then "noticed that [respondents] were both wearing large jackets and baggy pants," which he found "kind of odd" because "the weather was warm."[8] J.A. 61 (Tr. 29-30). He testified he found their style of dress "significan[t]" because "people have been known to conceal weapons or narcotics on their person." Tr. 61 (Tr. 30); but see Def. Ex. 1 (Lang's report states: "This

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[8] The record is unclear when Lang first noticed respondents' clothing. At the suppression hearing, Lang testified he did not "have anybody targeted or anything like that" when he boarded the bus, J.A. 105 (Tr. 76-77), and that he first noticed their clothing after he obtained permission to search Brown's carry-on bag. J.A. 61 (Tr. 29-30). He noticed they were wearing coats, and it was not that cold for early February. J.A. 105 (Tr. 77). He acknowledged it might be cold in their northern destination and sometimes gets cold on the buses. J.A. 83, 112-113 (Tr. 53, 84-85). At Drayton's trial, however, Lang testified he first noticed respondents "inside the terminal," and "again when they boarded the bus," and noticed their clothing. J.A. 139 (Trial Tr. 14). Lang did not, however, approach respondents until they were seated on the bus.

As to the fact that the men were wearing their coats, the Court can take judicial notice that the weather that day averaged, in Tallahassee 63°, and in Indianapolis (where they would presumably not arrive until mid-night) 35°. NOAA, National Climatic Data Ctr., Local Climatological Data (provided through Florida Climate Center, Office of State Climatologist). *See Ornelas* v. *United States*, 517 U.S. 690, 699-700 (1996) (making relevant weather observations and noting that "background facts" inform the judge's assessment of the "historical facts"). Also, Lang's testimony that respondents were "overcooperative," "almost too cooperative," J.A. 59, 111 (Tr. 28, 83), was presumably a reference to Brown, since he was the only one to respond verbally to the officers, and this testimony supports a finding that respondents' will was overborne by the coercive environment. Further, a passengers' "cooperation," or lack thereof, should not even be relevant if passengers are truly "free to ignore" the police.

is a known area to conceal *drugs* while traveling on the bus") (emphasis added).

Lang then asked Brown, "Do you mind if I check your person for weapons?" J.A. 91-92, 143 (Tr. 62-63; Trial Tr. 19); Def. Ex. 1, J.A. 113 (Tr. 86) (Lang's report states: "I asked for permission to check their person *for weapons*") (emphasis added); see also J.A. 92 (Tr. 63) (Q. ". . . you asked for limited authority to search for a weapon? A. Uh-huh.").

Brown responded, "'Sure.'" J.A. 61 (Tr. 30). He then leaned up, took a cell phone out of his pocket, and held open his jacket. J.A. 62 (Tr. 30); see also J.A. 143 (Tr. 19).

Lang's report states: "I checked the coat and then the waist area of Brown. I proceeded to check his groin area and touched an unknown object in that area." Def. Ex. 1, J.A. 113 (Tr. 85-86). Lang testified he first patted down Brown's jacket, then asked Brown to lean forward and frisked behind him, and then frisked Brown from his waist to his thighs, including "the groin or upper part of the legs." J.A. 62 (Tr. 31). Lang felt "hard object[s]" that were not "part of his anatomy." J.A. 144 (Trial Tr. 19); see also J.A. 63 (Tr. 31-32).

Lang asked Brown "did he mind standing up," and Brown stepped past Drayton into the aisle. J.A. 65 (Tr. 33). Lang signaled for Hoover to come to the back; Blackburn gave Lang handcuffs; Lang handcuffed Brown; and Hoover escorted Brown off the bus. J.A. 63-64 (Tr. 32-33).

Lang then turned his focus to Drayton and asked, "'Mind if I check you?'" J.A. 65 (Tr. 33). Drayton lifted his hands "maybe eight inches off his legs." J.A. 65 (Tr. 34). Lang then searched Drayton and, in the groin area, "felt the same thing with him." *Id.* Lang asked Drayton to stand, handcuffed him, and escorted him off the bus. *Id.* Lang also retrieved respondents' checked luggage from the bus. J.A. 111 (Tr. 83-84).

Drayton and Brown were escorted to an adjacent parking lot. J.A. 65 (Tr. 34). Officers read their *Miranda* rights, then unbuttoned their pants. J.A. 66 (Tr. 35). Each respondent was wearing several pairs of boxer shorts with bundles of cocaine taped between layers. *Id.* Brown had three packages containing 483 grams of cocaine, and Drayton had two packages with 295 grams. J.A. 67 (Tr. 35). The packages were round, about five inches long and one-and-a-half to two inches in diameter. J.A. 66 (Tr. 35).

The officers are usually on the bus 15 to 20 minutes, enough time to search two to three passengers. J.A. 69-70 (Tr. 38-39). The driver is sometimes waiting when they finish. J.A. 79 (Tr. 48). Lang denied they ever delay buses. J.A. 69 (Tr. 38).

Lang agreed that advising passengers of their right to refuse takes "only three to five seconds" and imposes no "additional burden" on him. J.A. 97 (Tr. 67-68). He has previously said something like, "'You do have a right to refuse, but I would like for your cooperation,'" but not on this date. J.A. 81-82, 93 (Tr. 51, 64). Passengers are not told some people occasionally refuse, and Lang agreed they would have no way of knowing this. J.A. 96 (Tr. 66-67).

2. Respondents were charged by indictment with conspiring to possess powder cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 846, and possessing powder cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). J.A. 6.

Respondents filed motions to suppress, and a consolidated suppression hearing was held. The government agreed there was no probable cause or reasonable suspicion, that the only issue was consent. J.A. 113, 37 (Tr. 85, 3); see also government's Response, J.A. 10. The government conceded the Eleventh Circuit "specifically and repeatedly say[s], there is no per se rule." J.A 127 (Tr. 102). The district court

agreed. J.A. 131 (Tr. 106). Neither party raised the issue of seizure.

The district court denied the motions to suppress. J.A. 11.

3. The court of appeals reversed and remanded with instructions to grant the motions to suppress.

The government filed a petition for rehearing en banc. J.A. 32. *Not one judge*, not even the dissenter in *Washington*, voted to rehear the case. *Id.*

SUMMARY OF ARGUMENT

The government's argument contains two fatal flaws, both of which stem from a fundamentally incorrect reading of the Eleventh Circuit's decisions. The Eleventh Circuit's opinion neither created a *per se* rule that a bus passenger's consent will be invalid absent advice of the right to refuse, nor held that respondents were seized.

Most importantly, regardless of the rubric under which this warrantless, suspicionless police-citizen encounter is analyzed, it is clear that respondents were seized and did not give voluntary and uncoerced consent to searches of their groin areas.

ARGUMENT

I. THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARD; FURTHER, IT HAS NOT ADOPTED ANY *PER SE* RULE REQUIRING THAT PASSENGERS BE ADVISED OF THEIR RIGHTS.

As an initial matter, it is important to understand what the court of appeals did *not* say, either in the opinion below or in the *Washington* and *Guapi* opinions of which the government complains. *First*, the government is wrong in asserting that the court of appeals "held that respondents had been illegally

seized" within the meaning of the Fourth Amendment. Govt. Br. 10. The court of appeals did not even address whether respondents were "seized." Instead, the sole issue addressed by the court of appeals was whether respondents gave voluntary consents.[9] This distinction is important because several of the government's contentions about the scope and potential impact of the decision below are misguidedly based on its mischaracterization of the opinion. *Second*, the court of appeals did not "effectively establish[] a per se rule that officers must offer bus passengers *Miranda*-like warnings of the right to refuse consent." Govt. Br. 28. The court of appeals did not even *address* that factor in this case. Rather, the court of appeals has consistently adhered to this Court's totality of the circumstances test, in each case applying the factors relevant to the issue at hand.

A. The Eleventh Circuit Did Not Address Whether Respondents Were Seized.

In our view, much of the government's criticism of the court of appeals' opinion is misdirected because it is premised on the incorrect notion that the court of appeals held that respondents were "illegally seized" during their encounter with the police. Govt. Br. 10; see also *id.* at 12, 23. However, the court of appeals did *not* hold that the police conduct in this case effected a "seizure." The court of appeals did not even address whether a seizure occurred. Instead, "[t]he only issue" addressed by the court of appeals was "whether the consent given by each defendant for the search was 'uncoerced and legally voluntary' under the Fourth Amendment." Pet. App. 2a.

As a factual matter, we agree with the government that the inquiry whether a particular police encounter constitutes a "seizure" and the inquiry whether "consent" obtained during

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[9] Similarly, the only issue raised in the district court, and briefed and argued to the court of appeals, was consent.

that encounter is "voluntary" are often "related," Govt. Br. 32 n.5, particularly where the encounter is brief and essentially consists of requests for consent. Indeed, we argue below (Section II) as an alternative basis for affirmance that the factual record in this case supports a finding that respondents were illegally "seized."

As a legal matter, however, the issues are not the same. Whether a police encounter constitutes a "seizure" is a threshold inquiry that determines whether the Fourth Amendment is implicated at all, *i.e.*, whether the encounter is entirely outside the confines of the Fourth Amendment. The "voluntariness" inquiry comes into play when there is police conduct that plainly implicates the Fourth Amendment (such as the warrantless, suspicionless body searches in this case) and that is illegal absent valid consent. Here, the court of appeals held that respondents' Fourth Amendment rights were violated because they were subjected to warrantless, suspicionless body searches that were not supported by voluntary consent.

The distinction is important because the government spends much of its brief attacking the court of appeals' posited holding that respondents were "seized" and arguing that this holding "is contrary to this Court's precedents." Govt. Br. 23. But the government is fighting a straw man because the court of appeals did not hold that a "seizure" took place. For example, the government frames the issue as whether "*the interaction* between Officer Lang and respondents was consensual" and reviews this Court's case law addressing whether such encounters "implicate the Fourth Amendment," including decisions holding that law enforcement officers have broad leeway to approach citizens in a variety of settings and ask them questions without triggering Fourth Amendment scrutiny, assuming the citizen "consents" to the encounter by being willing to listen. *Id.* at 13-14 (emphasis added) (citing, *inter alia*, *Florida* v. *Rodriguez*, 469 U.S. 1 (1984) (per

curiam); *United States* v. *Mendenhall*, 446 U.S. 544 (1980); *Florida* v. *Royer*, 460 U.S. 491 (1983)).

The court of appeals did not address, however, whether the mere approach by the officers in this case, or the brief questioning that followed, or even the encounter in its entirety, constituted a "seizure" within the meaning of the Fourth Amendment. Accordingly, the decision below cannot be "contrary" to this Court's precedents according police officers broad leeway to approach citizens for the purpose of asking questions without implicating the Fourth Amendment.

Similarly, the government contends that the court of appeals "held that a seizure had occurred" because one of the officers "introduced himself to respondents," "showed respondents his badge," and "identified himself as a police officer," and then criticizes this purported holding as "effectively creating a per se rule" that officers must warn citizens of their right to refuse consent to search. *Id.* at 12-13; see also *id.* at 23. Again, however, the court of appeals did not hold that a seizure occurred in this case - either when the officers approached respondents and identified themselves or otherwise. Thus, it plainly did not decide that mere self-identification by police officers "convert[s] a consensual encounter into a seizure." *Id.* at 22.[10]

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[10] Nor did the court of appeals hold that mere self-identification by police officers renders consent to a search involuntary. Instead, the court of appeals merely addressed whether the passenger-specific show of authority *in this case* was a *factor* that contributed to a finding of coercion, and concluded that it was, because Lang's passenger-specific show of authority was not "less coercive" than a general bus-wide show of authority. Pet. App. 7a & n.5.

B. The Court Of Appeals Has Not Adopted A *Per Se* Advice Requirement; In Fact, It Has Repeatedly Rejected Such A Rule.

The government contends[11] that the court of appeals has adopted "a per se rule that officers must afford bus passengers *Miranda*-like warnings of their right to refuse consent before asking for permission to conduct a search." *Id.* at 12; see also *id.* at 28, 30. The government concedes, however, as it must, that the court of appeals has not *explicitly* adopted such a per se rule. See Reply Br. for the Petitioner in support of Pet. for Cert. at 8 ("The question here, however, is not whether the court of appeals has explicitly established a *de jure* warning requirement. It is instead whether the decision has the *effect* of requiring warnings") (emphasis in original). The government's position is that the opinion below, along with the *Washington* and *Guapi* opinions, "[c]ollectively" and "effectively" establish a warning requirement.[12] Govt. Br. 30; see also *id.* at 28. As we demonstrate below, that position is incorrect.

Further, the government has ignored both the actual text of the Eleventh Circuit decisions and their genealogy. The government seeks to eliminate factors which this Court has decided are relevant to the totality test. Thus, contrary to the totality test, the government's brief reads like a "reverse per se" argument, because it attempts to discount into obscurity relevant factors. For instance, because *INS* v. *Delgado*, 466 U.S. 210 (1984), upheld a search during which officers were stationed at the door does not mean, as the government suggests (Govt. Br. 25), that the fact there was an officer near

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[11] Contrary to its argument here, the government conceded to both the district court and the court of appeals that the Eleventh Circuit does *not* have a per se rule. *See supra* at 9.

[12] In the district court, the government characterized the facts in *Guapi* and *Washington* as "cattle call show[s] of force." J.A. 37 (Tr. 4).

the bus door here is no factor at all in the totality analysis of this case.[13]

1. The Court Of Appeals Did Not Expressly Adopt A Warning Requirement.

The government relies on a "collective[]" reading of the opinion below and the *Washington* and *Guapi* opinions because it is not possible to read any of the three opinions individually and come to the conclusion that the court of appeals has established a warning requirement. To the contrary, the court of appeals has expressly rejected such a warning requirement and properly examined the totality of the circumstances.[14]

In the decision below, the court of appeals did not even mention that the officers in this case did not inform Drayton and Brown of their right to refuse consent to search.[15] Accordingly, there is no discussion of what weight the court of appeals gave to this factor, if any, and certainly no discussion suggesting that this factor was dispositive.

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[13] Such logic was expressly rejected by this Court in *United States* v. *Arvizu*, 122 S. Ct. 744, 751-52 (2002), because the Ninth Circuit there had found that certain factors were entitled to no weight in the application of the totality test. The government takes the same approach regarding the on-bus locus of the search (*Bostick*) and the target's knowledge of the right to refuse consent (*Schneckloth*).

[14] The government did not seek review in this Court of the *Guapi* or *Washington* decisions. Apparently, when those decisions were issued, the government concluded that neither opinion individually established a warning requirement and that the two opinions collectively did not establish a warning requirement. *See* Reply Brief for the Petitioner in support of the Petition for Cert. at 5-6.

[15] The court of appeals only noted that there was no "reassurance" in this case, as in *Washington*, that the passengers were not under arrest. Pet. App. 7a. The *Drayton* Court had no reason to address the "reassurance" because it was made in the *Washington* case.

The government relies on the fact that the court of appeals held that this case is "controlled" by *United States* v. *Washington*, in which another panel concluded that a bus search violated the Fourth Amendment because "a reasonable person . . . would not have felt free to disregard [the agents'] requests without some positive indication that consent could have been refused." Pet. App. 5a-6a (quoting *Washington*, 151 F.3d 1354, 1357 (11th Cir. 1998)). As we explain below, this language from *Washington* does not suggest the establishment of a per se rule requiring warnings. Accordingly, the court of appeals' quotation of that language in the decision below does not suggest that the court of appeals endorses a warning requirement. To the contrary, the court of appeals expressly acknowledged in the decision below that *Washington* has been criticized as adopting a per se rule requiring warnings, *id.* at 2a n.2, stated that it "[did] not have any occasion to pass on that criticism," and "express[ed] no view concerning it." *Id.* *United States* v. *Washington* itself expressly rejected a per se requirement. 151 F.3d 1354, 1355, 1357 (11th Cir. 1998). Accordingly, there is nothing in the opinion below to suggest that the court of appeals adopted a per se rule requiring warnings.

Nor did the court of appeals adopt a per se rule requiring warnings in *Washington*. Instead, the *Washington* panel considered the totality of the facts and circumstances surrounding the bus search at issue and concluded that the police conduct violated the defendant's Fourth Amendment rights. The court of appeals there considered nine separate factors. *Id.* at 1355-57. The *Washington* panel repeatedly made clear that its ruling was based on all the specific facts and circumstances surrounding the police conduct in the case: "*[L]ooking at the circumstances of this case*, we feel that a reasonable person *in the defendant's position* would not have felt free to disregard [the agent's] requests without some positive indication that consent could have been refused." *Id.*

at 1357 (emphasis added).[16] Thus, it is clear the court of appeals properly decided *Washington* based on the totality of the circumstances rather than any per se rule.

The court of appeals' statement that a reasonable person in the defendant's position would not have felt free to disregard the officers' requests "without some positive indication that consent could have been refused," *id.*, does not indicate that the court of appeals gave this factor dispositive weight and thereby departed from a totality of the circumstances approach. The court of appeals concluded that, under the facts and circumstances of the case, the presence of such a "positive indication" would have tipped the balance in the government's favor. This conclusion is wholly consistent with this Court's recognition that the presence of advice is an important factor that supports the voluntariness of consent. *Florida* v. *Bostick*, 501 U.S. 429, 432 (1991) (the fact that police advised defendant of his right to refuse consent is "particularly worth noting"); *Florida* v. *Royer*, 460 U.S. 491, 504 (1983) (by advising a citizen of his right to refuse cooperation, the police can "obviate[] any claim that the encounter was anything but a consensual matter from start to finish"); *United States* v. *Mendenhall*, 446 U.S. 544, 558 (1980) ("it is especially significant that the respondent was twice expressly told that she was free to decline to consent to the search, and only thereafter expressly consented to it").[17]

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[16] *See also Washington*, 151 F.3d at 1355 ("*[T]he facts and circumstances of this search* required some indication to passengers that their cooperation was voluntary rather than mandatory") (emphasis added); *id.* at 1357 ("Without such notice [of the right to refuse consent] *in this case*, we do not feel a reasonable person would have felt able to decline the agents' requests") (emphasis added).

[17] The Fifth Circuit has similarly recognized that the practical effect of the police telling a citizen of his right to refuse to consent in the event the issue gets litigated "does in many instances assuage the fear of a court that an individual was intimidated into consent to a search." *United States* v. *Berry*, 670 F.2d 583, 597-98 (5th Cir. Unit B Mar. 1982) (en banc)

Accordingly, the *Washington* panel did not depart from a totality of the circumstances analysis and did not establish any warning requirement that would apply in future cases.

In addition, while "some positive indication that consent could have been refused" could have been the police officer telling Washington he had a right to refuse to consent, it does not necessarily mean the giving of such advice. "Some positive indication" could more broadly include any act or word sufficient to eliminate the coercive effects of the police officer's contact with Washington.

Similarly, the court of appeals did not adopt a per se rule requiring warnings in *United States* v. *Guapi*. As in *Washington*, the *Guapi* panel expressly rejected such a per se requirement: "[W]e reject the notion of a *per se* rule requiring bus passengers to be informed of their constitutional rights." 144 F.3d 1393, 1393 (11th Cir. 1998). "[W]e eschew the notion of a *per se* rule requiring bus passengers to be informed of their constitutional rights prior to a search." *Id.* at 1395. Moreover, the *Guapi* panel analyzed at least ten factors in support of its ruling, consistent with a proper totality analysis. *Id.* at 1396-97. Also as in *Washington*, the court of appeals expressly made a fact-specific ruling limited to the particular bus search at issue: "[*T*]*he facts and circumstances of this search* required some indication to passengers that their cooperation was voluntary rather than mandatory." *Id.* at 1393 (emphasis added); see also *id.* at 1395, 1397.[18]

(commending "DEA's salutary practice of informing individuals that they are free to refuse consent to a search"). This recognition has not, however, been enshrined in the Eleventh Circuit's constitutional dogma so that the absence of telling someone he can refuse to consent means the consent is involuntary. Rather, the Eleventh Circuit has exercised its constitutional responsibility to ensure that the government is held to its burden of proving that any consent given was indeed voluntary.

[18] Because the court of appeals considered all the relevant facts in this case, in *Washington*, and in *Guapi*, there can be no contention that the court of appeals improperly departed from a totality of the circumstances methodology by "categoriz[ing] certain factors relied upon by the District Court as simply out of bounds" or by "reject[ing]" factors "in isolation from each other." *Arvizu*, 122 S. Ct. at 748, 751.

2. The Court Of Appeals Did Not Tacitly Adopt A Warning Requirement.

The government also suggests that the court of appeals has tacitly adopted a per se warning requirement because it held that the bus searches in this case, in *Washington*, and in *Guapi* violated the Fourth Amendment. In particular, the government argues that "[i]f warnings are required in the innocuous circumstances of this case, it is difficult to imagine a situation in which they would not be necessary." Govt. Br. 30-31. See also *Washington*, 151 F.3d at 1358 (Black, J., dissenting) ("With this case as precedent, it is not clear that there will ever be any set of circumstances under which this Court can uphold a bus search if the officers do not inform the passengers of the right to refuse consent"). At bottom, the government suggests that the court of appeals has left police officers with no choice but to tell a passenger of his right to refuse to consent to a search request.

That suggestion is not correct. The court of appeals' recent bus search decisions, viewed individually or collectively, hardly limit police officers to any particular course of conduct. In each decision, the court of appeals identified several factors that, taken together, rendered the police conduct coercive, such as the blocking of the aisles in *Guapi*, the presence of an officer at the front of the bus in this case and *Guapi*, the specific wording of the police communications, and the officer's passenger-specific show of authority in this case. Accordingly, law enforcement officers can garner guidance as to the types of police conduct that will likely contribute to a finding of coercion. The government's argument that the police conduct in this case was "innocuous" is simply a factual disagreement with the Eleventh Circuit's conclusion that it was coercive.

Moreover, the court of appeals was under no obligation to provide examples of how law enforcement officers might constitutionally conduct bus searches, but several options readily come to mind. For example, they could approach passengers in the terminal. They could walk a drug dog through the terminal and thereby identify any passengers whose luggage or person presents a reasonable suspicion. They could stand with the drug dog as passengers reboard the bus. And they could, either in the terminal or on the bus, ask if any passengers are willing to *volunteer* themselves or their luggage for inspection. In our view, it would be quite reasonable for police officers to board a bus, identify themselves and announce to passengers that they are conducting drug and weapon interdiction, and advise that, if any passengers wish to *volunteer* to have their luggage searched, they can briefly exit the bus and meet them outside. This would ensure that any "consent" searches are truly "voluntary."[19]

3. The Court Of Appeals Correctly Analyzed The "Totality Of The Circumstances" In This And Prior Cases.

The court of appeals identified numerous facts supporting its decision, demonstrating that it properly based its ruling on the totality of the circumstances rather than any per se rule. The numerous facts discussed by the court of appeals include: (1) three officers boarded the bus, Pet. App. 3a; (2) the officers were casually dressed and no weapon was visible, *id.*; (3) the officers spoke to the passengers individually rather than by general announcement, *id.* at 3a, 6a; (4) one of the

[19] This is consistent with the definition of "voluntary," which is a willful act, something "brought about of one's own will," or "done by design or intention." *Webster's Ninth New Collegiate Dictionary* 1322 (1991). Similarly, *Black's Law Dictionary* 1413 (5th ed. 1979), defines "voluntary" in part as "unimpelled by another's influence; spontaneous; acting of one-self."

officers remained at the front of the bus, *id.* at 3a, 9a; (5) the officers did not block the aisle or interfere physically with the ability of the passengers to get off the bus, *id.* at 3a-4a; (6) Officer Lang's face was 12-18 inches from Drayton during the encounter, *id.* at 4a; (7) the officers' tone of voice, *id.*; (8) the officers' statements to the individual passengers, *id.*; (9) testimony concerning the infrequency with which bus passengers in other searches conducted by one of the officers had refused consent, *id.* at 4a, 8a; and (10) the bus passengers were not asked to display their tickets or photo identification, *id.* at 7a.

The court of appeals also engaged in a detailed comparison of the relevant factors in this case with those in *Washington*. In so doing, the court made several pertinent observations. *First*, the court of appeals rejected the government's argument that "a passenger-specific show of authority is any less coercive than a general bus-wide one." Pet. App. 7a. *Second*, the court of appeals concluded that "the failure to ask for [passengers' tickets or identification does not affect] whether other requests or commands are coercive." *Id.* *Third*, the court of appeals concluded that "six or seven refusals out of hundreds of requests is not very many." *Id.* at 8a. *Finally*, the court of appeals did not even address the absence of advice of the passengers' rights in this case. It noted only by comparison with *Washington*, where officers had opened their procedure with general advice that no one was under arrest, that no such "reassurance" was given in this case. *Id.*

The factors in the totality test are not meant to be considered mechanically – the totality of the circumstances analysis demands that the court get an overall sense of the police-citizen encounter. Once this Court reviews whether the Eleventh Circuit mined the relevant facts to achieve this overall sense, it becomes clear that the Eleventh Circuit applied a totality of the circumstances analysis, and therefore that this Court should affirm its ruling.

II. UNDER THE TOTALITY OF THE CIRCUMSTANCES, RESPONDENTS WERE SEIZED, BECAUSE A REASONABLE PERSON WOULD NOT HAVE FELT FREE TO IGNORE THE OFFICERS.

As respondents demonstrated above (Section I.A.), the court of appeals did not address whether respondents were "seized." Nevertheless, applying the totality of the circumstances test to the factors evidenced here, it is clear that respondents were seized. Accordingly, this Court can affirm the decision below on this alternative ground. *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970) ("[t]he prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court"); *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982) (the prevailing party "may rely upon any matter appearing in the record in support of the judgment below").

A. Standard For Determining Seizure In Random Bus Search: "Free To Ignore."

In *Florida* v. *Bostick*, this Court established the test for determining whether a police-citizen encounter on a bus, not premised on the officer's probable cause or even reasonable suspicion of criminal wrongdoing, is consensual. 501 U.S. 429 (1991). If the encounter is consensual, the Fourth Amendment is not invoked. *Id.* at 434. If, however, the "'officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen,'" the encounter loses its consensual nature, and the citizen is at that point "seized" for Fourth Amendment purposes. *Id.* (quoting *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16. (1968)).

The underlying assumption of *Terry* is that there is nothing wrong with an officer approaching a person in a public place and putting questions to him "if the person is willing to listen." *Florida* v. *Royer*, 460 U.S. 491, 497 (1983) (citing

Terry, 392 U.S. at 31, 32-33 (1968) (Harlan, J., concurring), and 34 (White, J., concurring)). "The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way." *Id.* at 497-98. Adapting the *Chesternut* "free to leave" principle to bus interdictions, the *Bostick* Court determined that the proper inquiry "when the person is seated on a bus and has no desire to leave" is whether, under the totality of the circumstances, "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Bostick*, 501 U.S. at 435-36 (citing *Michigan* v. *Chesternut*, 486 U.S. 567, 573 (1988)). The test is grounded in a person's "'liberty *to ignore the police presence* and go about his business.'" *Id.* at 437 (quoting *Chesternut*, 486 U.S. at 569 (emphasis added)).

Therefore, rude or unpatriotic as such behavior might seem, a citizen must be free to completely ignore a police officer's approach and questioning without risking any negative consequences. If a citizen is not free to ignore the police, he is "seized" under the Fourth Amendment. Absent a governmental purpose which overrides citizens' interests in simply being left alone and traveling freely, the seizure will be illegal, and any evidence gained as a result will be suppressed as fruit of the illegal seizure. *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444, 455 (1990); *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963). Because bus interdictions without reasonable suspicion are conducted for the "primary purpose" of "uncover[ing] evidence of ordinary criminal wrongdoing," the governmental interest must yield to the citizen's, and thus any "seizure" of a citizen will be illegal. *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 42 (2000).

B. Application Of "Free To Ignore" Standard To The Totality Of The Circumstances In This Case.

Applying the totality of the circumstances analysis, the applicable factors demonstrate that respondents were seized. These factors include:

1. Respondents Were Not Advised Of Their Right Not To Engage In Any Encounter With The Officers, *i.e.*, To Ignore Them.

Whether a passenger was advised of his right not to engage in any encounter with the police, or to refuse a request to search, is one important factor in the totality of the circumstances analysis for determining whether a seizure occurred. *Bostick* regarded as "particularly worth noting" the fact that "police specifically advised Bostick that he had the right to refuse consent." 501 U.S. at 432; Govt. Br. 17. Although this factor is important, a citizen's knowledge of the right to ignore officers or to refuse consent has not been held to be an absolute prerequisite for a court to find voluntary consent. See *United States* v. *Mendenhall*, 446 U.S. 544, 558-59 (1980). Nevertheless, that factor appeared to be one of the primary distinctions between the dispositions in *Mendenhall* and *Royer*. Compare *Mendenhall*, 446 U.S. at 558-59 (finding no seizure occurred and noting, in discussion whether consent was coerced, that respondent explicitly consented to search only after she was "twice expressly told that she was free to decline to consent"), with *Royer*, 460 U.S. at 504 (finding an illegal detention while noting that, if the officers had "inform[ed Royer] that he was free to go if he so desired, the officers might have obviated any claim that the encounter was anything but a consensual matter from start to finish").

Advice as to the right to refuse consent is a particularly important factor in deciding whether a person has been seized in a random bus search. This includes both the right to refuse to engage in an encounter or conversation with the officer, as

well as the right to refuse to have luggage searched and the right to refuse to have your person frisked. However, there are psychological[20] and practical forces at work which render bus sweeps for the purpose of gaining consent a highly coercive environment. A passenger who does not wish to be either "engaged" or "searched" has no option but to try to ignore the officer or be rude to him. Given the officers' bag-matching procedure, *infra* at 34, a passenger's only alternative to having carry-on luggage considered "abandoned" and then searched is to respond to the officers' inquiries, *i.e.*, to engage in conversation with the officer. For these reasons, *Bostick* correctly concluded that this factor is "particularly worth noting." 501 U.S. at 432. Consequently, courts are correct to heavily weigh this factor.

In ruling that a citizen's knowledge of his right to refuse consent is not "the *sine qua non* of an effective consent," this Court has noted that "it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 231-32 (1973) (observing that consent searches which occur "under informal and unstructured conditions" and "which may develop quickly . . . . are immeasurably far removed from 'custodial interrogation' where, in *Miranda* v. *Arizona*, we found that

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[20] *Miranda* warnings were developed to help dispel the psychological coercion inherent in custodial interrogations. *Miranda* v. *Arizona*, 384 U.S. 436, 448 (1966). Similarly, all but one of the factors the government cites here are psychologically oriented. Govt. Br. 17 (listing as the only non-psychological factor "whether [the agents] physically touched the citizen"). In *Bostick*, this Court noted that the "cramped confines of a bus are one relevant factor" in determining whether a passenger is "coerced to comply with a request that [he] would prefer to refuse." 501 U.S. at 438, 439. Underlying this recognition was the psychological orientation of the word "coerce." *See Webster's Ninth New Collegiate Dictionary* (1991) (noting the word derives from "arcére," Latin for "to enclose"). In its purest sense, then, "coercion" is a psychological concept which relates to spatial relationships between people in the context of their surroundings.

the Constitution required certain now familiar warnings as a prerequisite to police interrogation") (citations omitted). However, unlike the "unstructured" consent searches of *Schneckloth*, the Tallahassee Police Department's bus interdictions are routinized, scripted events. Govt. Br. 26 n.4; see also *United States* v. *Cuevas-Ceja*, 58 F. Supp. 2d 1175, 1179-80 & n.2 (D. Or. 1999) (recording the local police department's 18-point procedure for conducting bus interdictions). Lang acknowledged that giving notification would impose *no additional burden* on him and would take only *three to five seconds*.[21]

In sum, advice is an appropriate tool for smoothing the psychological terrain of on-bus police-citizen encounters. As such, it is properly an important factor in bus searches.

2. Locational Factors.

a. Bus Locus. In *Bostick*, this Court acknowledged that "where the encounter takes place is one factor, but it is not the only one" in considering all the circumstances surrounding a

[21] Thus, far from imposing an impractical burden on bus interdiction agents, as the government contends, Govt. Br. 33, consistent use of consent advice would be a boon for law enforcement. *See* Brief for the United States at 33, in *Dickerson* v. *United States*, 530 U.S. 428 (2000) (arguing that "compliance with *Miranda* helps ensure that statements will be found admissible because they were voluntary"). Similarly, administering consent warnings - when police choose to board buses with the intent of seeking consent for random searches - helps ensure that evidence gained from on-bus consent searches will be admissible in court. Also, just as "law enforcement officers and officials have well-assimilated the *Miranda* rules into their policies and procedures," Brief *Amici Curiae* of Americans for Effective Law Enforcement, et al. at 7, in *Dickerson* v. *United States*, 530 U.S. 428 (2000) (noting that, even when consent advice is not constitutionally required, good policy and practice may be to give them), many law enforcement agencies already train their officers to give consent advice prior to conducting any consent search. *Id.*; *see also The Law Enforcer's Pocket Manual* § 7-16-17; FBI, *Legal Handbook for Special Agents* § 5-4.5 (detailing procedures for administering consent warnings).

bus interdiction. 501 U.S. at 437; see Govt. Br. 16 (noting "[t]he location of the encounter" is a factor in determining whether a seizure occurred). As this Court has recognized, when the police question people in small spaces, the police presence is substantially more dominating than it would otherwise be if the police were to question people in a bus terminal or the bus parking lot. Cf. *Royer*, 460 U.S. at 502-03 (noting that transfer of Royer from airport concourse to a "small room - a large closet" caused "[w]hat had begun as a consensual inquiry in a public place [to] escalate[] into an investigatory procedure in a police interrogation room").

The relevance of this factor is highlighted by the statistics regarding the minimal number of bus passengers who refuse the police requests for consent (less than 1/100 of one percent). See also *United States* v. *Guapi*, 144 F.3d 1393, 1396 (11th Cir. 1998) (noting that, although officer testified he searched at least 28 buses per week, "he could only recall 'several times'" individuals refused search requests).

b. Officers Chose This Locus. This Court also noted that "Bostick's movements were "'confined'" in a sense, but it was the natural result of his decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive." *Bostick*, 501 U.S. at 436. The government agrees "the location of the encounter" and "the timing of [the officers'] arrival" are two specific factors in the totality test. Govt. Br. 17.

In this case, respondents were on a stopover[22] and were required to exit the bus. Lang first observed respondents "inside the terminal" about Noon, and Lang and his partners also watched them reboard the bus. However, the officers did not begin the interdiction until about 12:40 p.m., 40 minutes

[22] Although not a significant factor, respondents' ability to decline an encounter may have been diminished because they were in unfamiliar territory where they did not enjoy the support network and comfort level one naturally develops in his home town.

after first seeing them and only five minutes before the bus' departure time. Unlike *Bostick*, the officers here had ample time to approach respondents in an open area (the terminal or outside the bus), but the officers chose instead to wait until they were in the confined space of a bus seat. Thus, the police deliberately chose to wait to seek respondents' consent until after they were in a vulnerable position – seated and confined in a small space, and where the police could most effectively establish an intimidating presence by standing over the seated respondents. See *Royer*, 460 U.S. at 496. Therefore, the record certainly suggests that Lang took advantage of the intimidating and coercive venue of the bus when choosing the place to engage respondents and request consent to search.

In *Royer*, *id.* at 509, this Court noted that police did not request consent to search Royer until he was relocated from a public airport concourse to a "police room" the size of a broom closet and that no legitimate law enforcement purposes "were furthered by removing Royer to the police room prior to the officers' attempt to gain his consent to a search of his luggage." If Lang had approached respondents in the terminal, where both he and respondents would be standing in an open space, respondents would have been much less likely to feel intimidated into giving Lang consent to search.

Because the officers intentionally waited until respondents were on the bus, and waited until the scheduled departure time had passed to approach them, these factors support the conclusion that respondents were impermissibly seized.

3. Officers' Show Of Authority To All Passengers.

a. Assumption of Control Over the Bus. The government agrees that "whether [the police] conveyed any type of threat" is a factor. Govt. Br. 17. The nuances of how this interdiction transpired are crucial to appreciating the scene from a passenger's perspective. The officers were

standing by as the passengers boarded, were granted control of the bus by the driver, and began their questioning only after the passengers were settled. From a reasonable passenger's perspective, the image of multiple unticketed men boarding the bus en masse, one of whom stations himself in the bus driver's seat and starts watching them, must have seemed at the least confusing and intimidating. This procedure conveyed to passengers the true nature of the bus interdiction – that control of the bus had been turned over to these officers – and passengers had every reason to believe the bus was not going to leave until the officers finished whatever they came to do.

Beginning the interdiction process five minutes before the scheduled departure time, as the officers did here, when it generally takes at least 15-20 minutes, virtually guaranteed the bus would be delayed, which would have impermissibly detained all the passengers from their free travels. Once a bus interdiction passes from a pre-departure procedure to a departure-delaying exercise, the business of the passengers changes from waiting for departure to progressing to their destination. Officers blocking the bus' progress necessarily "seize" all the passengers, and *Bostick* and *Royer* instruct that a finding of probable cause or reasonable suspicion is necessary to legitimize the police presence on the bus which keeps passengers from going about their business of traveling.

The concept of actual, physical detention – or submission to an assertion of legal authority having that effect – has been a bright line defining seizures triggering Fourth Amendment scrutiny. *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968); *California* v. *Hodari D.*, 499 U.S. 621, 626 (1991). See *Michigan* v. *Chesternut*, 486 U.S. 567, 574-75 (1988) (finding "an attempt to capture or otherwise intrude upon respondent's freedom of movement" defines the frontier between consensual encounters and attempted seizures). Like *Delgado*'s factory workers, respondents' freedom was "meaningfully restricted," 466 U.S. 210, 218 (1984); unlike

those factory workers, however, respondents were "seized" to the extent the officers' actions delayed their bus.[23]

b. Number and Positioning of Officers. "[W]hether there was a threatening number of officers" is another factor recognized by the government. Govt. Br. 17. Upon boarding, Hoover knelt in the driver's seat, studying the passengers' reactions, while Lang and Blackburn proceeded to the back of the bus and began working as a team. After Blackburn searched the rearmost passenger with Lang watching, Lang began working forward while Blackburn observed and assisted. The presence of three officers on the bus, strategically located to effectively surround the passengers, presents a threatening posture for passengers on a bus, and the Eleventh Circuit was correct to note that this factor "cuts in

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[23] Several federal courts have recognized that a police-imposed delay of a bus' departure would implicate the Fourth Amendment. Shortly after *Bostick*, the Ninth Circuit highlighted the distinction between bus interdictions which engender delay and those which do not. *See United States* v. *Gonzales*, 979 F. 2d 711, 713 (9th Cir. 1992) (finding no seizure where officer boarded bus at red light and conducted consent searches *on the moving bus* because no passengers were "prevent[ed] . . . from going on their way"); *United States* v. *Flowers*, 912 F. 2d. 707, 711 (4th Cir. 1990). *Accord United States* v. *Rembert*, 694 F. Supp. 163, 175 (W.D. N.C. 1988); *United States* v. *Fields*, 909 F. 2d. 470, 474 n.2 (11th Cir. 1990). *See also United States* v. *Barrett*, 976 F. Supp. 1105, 1108 (N.D. Ohio 1997). Likewise, the roadblock detention cases this Court has considered are analytically analogous. *Compare United States* v. *Martinez-Fuerte*, 428 U.S. 543, 556 (1976) (the parties stipulated, and this Court agreed, the brief checkpoint stops to detect illegal aliens were "'seizures'"); *Sitz*, 496 U.S. at 448 (sobriety checkpoint stops delaying motorists an average 25 seconds were "seizures" made absent reasonable suspicion); and *Indianapolis* v. *Edmond*, 531 U.S. 32, 35, 42 (2000) (concluding that cars stopped an average "two to three minutes or less" at narcotics checkpoints were "seized" and ruling the brief detentions unconstitutional because "primary purpose" was "to uncover evidence of ordinary criminal wrongdoing"). Because roadblocks and departure-delaying bus interdictions are nonconsensual, both produce Fourth Amendment seizures.

the defendants' favor." Pet. App. 9a. The court reasoned rightly that "[s]eeing an officer stationed at the bus exit during a police interdiction might make a reasonable person feel less free to leave the bus." *Id.*

The government views the Eleventh Circuit's weighing of this factor as being "directly at odds with this Court's decisions." Govt. Br. 25. The government cites *Delgado* for the proposition that placing an officer near an exit "should not have resulted in any reasonable apprehension by any [employees] that they would be seized or detained in any meaningful way." *Id.* at 25-26.[24] Unlike Delgado, however, who was free to move about a large factory and who even passed unquestioned through factory doors during the INS sweep, respondents were not free to ignore the officers. Therefore, in this situation, the officer stationed near the exit, given that passengers were not *told* they were free to leave, is a relevant factor which weighs in favor of finding a seizure.

c. Officers' Appearance and Demeanor. Certainly the officers' plain clothes, quiet tone, and polite demeanor appear to weigh against finding a seizure. However, other factors weigh heavily in favor of a seizure finding. Though there is no evidence any passenger saw the officers' weapons in side holsters, people expect officers to carry guns. Likewise, although Lang testified their handcuffs were covered, the passengers, including Drayton, certainly saw them once Brown was arrested. Similarly, the passengers saw their displayed badges.

d. Officers Constructively Blocked the Aisle. The Eleventh Circuit noted that the officers "did not block the aisle, but instead stood next to or behind the passengers with

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[24] *Delgado* is also distinguished by the fact that it involved a search based on a warrant. 466 U.S. at 212.

whom they were talking." Pet. App. 3a.[25] In the bus interdiction analysis which operates on the "free to leave" principle drawn from *Mendenhall* and *Chestermut,* whether officers actually blocked the aisle might signal whether "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Bostick*, 501 U.S. at 436. The government makes much of Lang's testimony that passengers "'often exited the bus while officers were on it.'" Govt. Br. 26. However, that testimony relates to his general procedure; there was no testimony that anyone exited that day. Lang also acknowledged that he would have to step aside to let someone pass in the narrow aisle. This factor, then, weighs in respondents' favor.

4. Officers' Specific Show Of Authority To Drayton And Brown.

a. Officers Presented Their Badges. Given the locational factors and the officers' show of authority to all passengers detailed above, the Eleventh Circuit "[did] not believe that a passenger-specific show of authority [was] any less coercive than a general bus-wide one." Pet. App. 7a. Indeed, it was argued below that it was *more* coercive. J.A. 119 (Tr. 92); Drayton's Br. at 33. See *infra* at 36 n.29. The court of appeals noted the authoritativeness of Lang when he

[25] Though Lang was careful not to block the aisle, his testimony reflects there was a drug dog at the scene. He did not indicate where the dog was during this interdiction. If the drug dog was positioned outside the bus door, and with Hoover remaining "outside" the bus door (as Lang appeared to testify at trial), that option was eliminated. The dog's presence would have served to leverage Lang's vague suspicions by forcing respondents to either engage in an encounter they would rather avoid or risk passing an intimidating dog. *See, e.g., Barrett*, 976 F. Supp. at 1110 (finding defendant likely consented because of drug dog outside the bus: "[b]y detaining the defendant and putting him involuntarily to the choice between allowing the officer to search his bag or possibly having it checked by a dog, [the officer] successfully, but improperly, exploited the primary unlawfulness of the detention").

approached Drayton and Brown, and "with his badge held up in his hand, leaned over with his face 12 to 18 inches from Drayton's, and told the defendants that he was conducting a bus interdiction, looking for drugs and illegal weapons." Pet. App. 7a.[26] The effect was not simply to inform respondents,[27]

[26] Research demonstrates the ways, psychologically speaking, people can be induced to behave in a manner contrary to their own best interests - in this setting, to say "yes" when what they really want to do is "just say no." The overall answer lies in the simple yet compelling power of the situation. First, research into the behavioral consequences of interpersonal distances (proxemics) defines eight such distances and indicates the behavior considered appropriate for each one. E.T. Hall, *The Silent Language* (1959). A distance of 6 to 18 inches constitutes intimate distance, a distance reserved for people with whom we feel intimate. Moreover, this distance falls within the imaginary "bubble" that is the boundary for personal space. R. Sommer, *Personal Space: The Behavioral Basis of Design* (1969).

The social implication of a stranger suddenly moving into that range creates emotional distress, physiological reactions, and felt loss of control. Hall, *supra*; Sommer, *supra*. Thus, an officer who leans in with his face less than 18 inches away from the subject will reduce the subject's felt independence, regardless of what is said, and this is especially true in the confined environment of a bus, where another officer is standing adjacent to the first, and particularly where the seating arrangement prevents the normal response of backing up to withdraw from the invasion. While we all acquire much of this knowledge through normal social interactions, *e.g.*, being in a crowded elevator or choosing a seat in an almost-empty room, law enforcement officers are all trained in the ways in which cooperation can more quickly be obtained. *See supra* at 6 n.7. F.E. Inbau et al., *Criminal Interrogation and Confessions* (3d ed. 1986).

[27] Contrary to the government's contention that this "reassures the citizen that he is communicating with the police," Govt. Br. 12, it strains credulity that, several minutes into the interdiction, with three officers stationed throughout the bus exploring passengers' bags, and passengers waiting on the bus to depart, any passenger on that bus did not realize Lang was a police officer. The government makes much of the district court's incredible observation that the officers "'could have been mistaken for other passengers,'" thus arguing that Lang had to identify himself and show his badge. *Id.* at 18. If Lang's introduction of himself as an officer is not a "show of authority" because people would not know he was an

as the government argues, but also to reinforce Lang's authority over them.

b. Proximity of the Officer to Drayton and Brown. The government notes that the "officers' proximity to the citizen" is a factor to be considered. Govt. Br. 17. This factor, too, must weigh towards finding an illegal seizure here. From a distance of only 12-18 inches, Lang places his "total focus" on the individual passenger. This proximity to and "total focus" from a complete stranger would make most people extremely uncomfortable and strongly supports a finding that respondents had been "seized" at that point.

c. Officers' Practice of Bag-matching. The passengers were forced to interact with Lang due to his practice of matching carry-on luggage with individual passengers. A reasonable person subject to this procedure would realize he faced only two options – engage Lang and identify his carry-on luggage or risk having Lang remove and search it as "abandoned property." See, *e.g.*, *United States* v. *Sanders*, 130 F.3d 1316, 1317-18 (8th Cir. 1997) (holding that luggage unclaimed in bus interdiction was "abandoned" and subject to search); see also *United States* v. *Edmondson*, No. 3:01-M-0403-HTS (M.D. Fla. 2001) (noting that, after officers claimed bags as "abandoned" and passenger exited the bus, he was pursued and arrested).[28] This Court has noted the private nature of many items passengers carry with them while traveling. Lang's bag-matching procedure is especially distasteful because it forced passengers to affirmatively

officer, it would also follow that the fact that people leave the bus daily while he is conducting searches is irrelevant because they would likely not know he is an officer; the observation would prove nothing about whether passengers feel free to deboard during a bus sweep. In any event, the district court was equivocal about this finding and ultimately determined it made no difference. J.A. 130 (Tr. 105).

[28] Note this is similar to the treatment of passengers' bags noted in *Guapi* and *Washington*. *See Guapi*, 144 F.3d at 1394; *United States* v. *Washington*, 151 F.3d 1354, 1355 (11th Cir. 1998).

protect their carry-on luggage from police probing. See *Bond* v. *United States*, 529 U.S. 334, 337-38 (2000) (noting in the context of a bus sweep that "travelers are particularly concerned about their carry-on luggage; they generally use it to transport personal items that, for whatever reason, they prefer to keep close at hand"); see also *Sitz*, 496 U.S. at 465 (Stevens, J.,dissenting) ("Unwanted attention from the local police need not be less discomforting simply because one's secrets are not the stuff of criminal prosecutions").

Thus, ignoring Lang's presence was not an option. Contrary to this Court's teaching in *Delgado*, the passengers here had no alternative but to engage in an encounter with Lang. 466 U.S. at 218 (instructing that agents could not lawfully detain employees who "simply refused to answer" agents' questions). This bag-matching procedure, then, violated this Court's dictate that "police [may] not convey a message that compliance with their requests is required." *Bostick*, 501 U.S. at 435.

d. Officers' Commanding Language Conveyed an Expectation of Cooperation. The government cites as another factor "whether [the officers] used authoritative language or a tone of voice showing that compliance is required." Govt. Br. 17. The government considers Lang's "temperament and demeanor" on the witness stand to be probative evidence to establish that he did not use an authoritative tone of voice on the bus. *Id.* at 19. However, the record reflects that the volume of voice with which Lang addressed Drayton from a distance of 12 to 18 inches carried a "considerable distance" through the courtroom. Even if Lang were talking at a normal volume, it likely would be perceived by a reasonable person as intimidating when delivered from a stranger standing above him and at a very close distance.

The language Lang used during the interdiction indicates that he was intent on eliciting "consent" from passengers.[29] Lang's introduction was authoritative and purposeful:

> I'm Investigator Lang with the Tallahassee Police Department. We're conducting bus interdiction, attempting to deter drugs and illegal weapons being transported on the bus. We would like for your cooperation. Do you have any bags on the bus?

J.A. 82 (Tr. 52). Nothing in this introduction suggests that the interaction was consensual.[30] Lang said who he was, what

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[29] French and Raven have identified five bases of social power. J.R.P. French, Jr. & B. Raven, *The Bases of Social Power, in Studies in Social Power* 150 (D. Cartwright ed., 1959). Two of these, *legitimate power* and *coercive power*, are integral to law enforcement. Raven and French, *supra*. Here, also, the bus driver transferred to the officers his recognized *legitimate* authority over the bus: "It's all yours," and the officer in his seat assumed that role in the minds of the passengers. *See also* S. Milgram, *Behavioral Study of Obedience*, 67 J. Abnormal & Soc. Psychol. 371 (1963); S. Milgram, *Obedience to Authority: An Experimental View* 18-21 (1974); Thomas Blass, *Understanding Behavior in the Milgram Obedience Experiment: The Role of Personality, Situations, and Their Interactions*, 60 J. Personality & Soc. Psychol. 398, 409 (1991). For this reason, "very few people, if any, feel comfortable refusing a police request, even when the encounter is otherwise perceived as friendly." Adrian J. Barrio, Note, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent*, 1997 U. Ill. L. Rev. 215, 216; *see also* Dennis J. Callahan, Note, *The Long Distance Remand: Florida v. Bostick and the Re-Awakened Bus Search Battlefront in the War on Drugs*, 43 Wm. & Mary L. Rev. 365, 408-09 (2001). *See also* M. Zachary, *Supreme Court Revisits Searches Of Bus Passengers*, 2002 Lawyers Weekly USA 229 (Apr. 1, 2001).

[30] A passenger-specific show of authority is, if anything, more coercive than a general announcement by officers to all passengers when they board the bus. Although the passengers undoubtedly knew the men were police officers, and although respondents likely overheard them talking to the three men behind him, having a large police officer suddenly pop over your shoulder, within 12-18 inches of your face, holding up his badge and

he was doing, and then immediately asked whether respondents had any bags on the bus. Not only did Lang not advise respondents that they did not have to consent to the encounter, Lang never even asked respondents if they wanted to engage in an encounter. He *assumed* cooperation.

> Q. [Mr. Blow]: You went straight in from one end to the other. There was never a question, 'Will you cooperate?' was there, sir?
>
> A. [Inv. Lang]: No sir.
>
> Q. So you expressed your desire to have their cooperation and then immediately ask, May I search your person, or search your bags?
>
> A. I was immediately given permission.

J.A. 94 (Tr. 64-65).

Lang told the passengers what he was "going to do" and acknowledged that, when he purportedly "asked" for consent, he did not wait on an answer. Of course, the irrelevance of the passenger's response or "consent" is most apparent in Drayton's case; in spite of the fact that Drayton said *not one word* to the officer, the officer proceeded to do what he was "going to do," which was frisk. Consent or lack thereof was irrelevant.[31] See *Terry*, 392 U.S. at 16 (noting that police there forced the defendant to engage with them, thereby seizing him). Second, Lang agreed with the assessment of the district court that his style was "in your face" and

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communicating that he expects your cooperation, would not allow a passenger any time to rationally process whether the passenger *wanted* to talk or whether there were any options but "cooperation." At least with an announcement from the front of the bus, followed by approaches to individuals, the passengers have a chance to *think* about how to respond.

[31] This explains why the court of appeals addressed only the coerciveness of the environment in which the encounter occurred, making it unnecessary to address the specifics of their alleged "consents" or the distinctions between Brown's verbal responses and Drayton's silence.

acknowledged that he held up his badge "to show he was the authority." The unambiguous message from Lang's authoritative language and manner was that he expected "cooperation" and that it would result in "consent" to search both Brown's bag and respondents' persons.[32]

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[32] Consistent with the prosecutor's explanation of Lang's method, *see supra* at 6 n.7, studies into "phased commitment" demonstrate that compliance can often be obtained, even without overt coercion. In the present setting, such phased commitment would have begun with the officer asking the subject a simple, seemingly innocuous request, and then gradually asking the subject more intrusive requests. This method is effective because, once the subject has agreed to even the first step (*e.g.*, just responding verbally to the officer), it becomes more difficult at each later stage to change the agreeable response to a negative one. *See, e.g.*, L. Festinger & J. M. Carlsmith, *Cognitive Consequences of Forced Compliance*, 58 J. Abnormal & So. Psychol. 203 (1959); J.L. Freedman & S.C. Fraser, *Compliance Without Pressure: The Foot-In-The-Door Technique*, 4 J. Personality & Soc. Psychol. 195 (1966); J. Dillard, *The current status of research on sequenial-request compliance techniques* 17 Personality & Soc. Psychol. Bull. 283 (1991); J. M. Burger, *The foot-in-the-door compliance procedure: A multiple process analysis and review*, 3 Personality & Soc. Psychol. Rev. 303 (1999). Given the prosecutor's argument, it appears clear that Lang's style is not accidental but rather based on such knowledge.

Finally, research into "scripted conformity" establishes that many social interactions, *e.g.*, routine etiquette, are engaged in without the subject actually *thinking* about what he or she is doing – *i.e.*, a certain *mindlessness*. *See, e.g.*, R.C. Schank & R. P. Abelson, *Scripts, plans, goals, and understanding* (1977); E. J. Langer, *Rethinking the role of thought in social interaction, in* 2 *New Directions in Attribution Research* 36 (J. H. Harvey et al. eds., 1978). Thus, if an officer gives a subject what *sounds like a reason*, compliance is more likely. In this way, Lang's request to check Brown "for weapons" would distract attention away from the true object of his search, which was drugs. After all, this was a drug interdiction team.

The same can be said of the coercive social pressure, especially in a crowded group of people, to "cooperate" when other passengers have already demonstrated that is the proper response to the situation. In that situation, it becomes even more difficult for one person to suddenly say "no." In this regard, Lang's explanation that, when people do refuse, they

The best test of the coerciveness – or not – of this encounter is whether a reasonable passenger would react any differently to the same behavior by a fellow traveler. Viewed in that light, the coerciveness of this encounter is clear. At some point very early in the officer's intrusion, *but for the officer's authority*, a reasonable person would have told a total stranger to "back off." This was one of the most highly intrusive types of searches imaginable – the frisk of a citizen's groin area. If manual manipulation of a passenger's carry-on bag is intrusive, *Bond*, 529 U.S. at 337-38, body frisks of the groin area are substantially more invasive and intrusive. There is nothing worse that could be done to a passenger in a public place.

e. Officer's Physical Touching and Confinement of Drayton. Brown, in the window seat, was the first man Lang searched, and to do so he had to lean across Drayton's body. Common sense indicates it would have been impossible for Lang to accomplish his extensive search of Brown without "touching" Drayton in the aisle seat.[33] Even if it were conceivable to do this without touching Drayton, it is indisputable that Drayton could not move – that is, he was completely restrained physically – once Lang started leaning across him. Not only could he not "ignore" an officer in this position, he certainly could not have gotten up and left the bus.

In *Brower* v. *County of Inyo*, this Court addressed the element of physical control in determining whether a seizure occurs in a given case. 489 U.S. 593 (1989). This Court reasoned "that a Fourth Amendment seizure does not occur

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are somewhat confrontational, suggests that it is necessary for passengers, or they *feel* it is necessary, to be confrontational to effectively communicate that they do not wish to be searched or have their bags searched.

[33] Drayton and Brown were neither tall nor skinny. Drayton was five feet and nine inches tall and weighed 190 pounds; Brown was five feet and seven inches tall and weighed 198 pounds. Def. Ex. 1, at 2.

whenever there is a governmentally caused termination of an individual's freedom of movement . . ., nor even whenever there is a governmentally caused and *desired* termination of movement . . ., but only when there is a governmental termination of movement *through means intentionally applied.*" *Id.* at 596-97. Here, there can be no doubt that Lang, reaching across Drayton in the cramped confines of the bus seats, placed Drayton under his physical control. Under his authority as a law enforcement officer, Lang, admittedly without reasonable suspicion, placed Drayton under his physical control, thus "seizing" Drayton for Fourth Amendment purposes.

f. Brown's Arrest. Of course, Brown's arrest presented the classic "show of authority" to Drayton.

III. THE ELEVENTH CIRCUIT CORRECTLY HELD THAT, UNDER THE TOTALITY OF THE CIRCUMSTANCES, RESPONDENTS DID NOT VOLUNTARILY CONSENT TO THE SEARCHES OF THEIR PERSONS.

It is well-settled law that consent to search given as a result of police coercion is not consent at all. See *Bumper* v. *North Carolina*, 391 U.S. 543, 550 (1968). When the government "seeks to rely upon consent to justify the lawfulness of a search, [it] has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Id.* at 548-49 (footnote omitted). This Court has long recognized that police coercion comes in both overt and more subtle forms. As this Court said, over one hundred years ago, in considering when a search is unreasonable under the Fourth Amendment:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Boyd v. *United States*, 116 U.S. 616, 635 (1886); see also *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 228 (1973) ("no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed").

The same factors which established that respondents were seized, plus the additional factor of their responses to Lang, demonstrate that they did not give voluntary consent. Respondents summarize them briefly.

A. Cramped Confines Of Bus.

"The cramped confines of a bus are one relevant factor that should be considered in evaluating whether a passenger's consent is voluntary." *Florida* v. *Bostick*, 501 U.S. 429, 439 (1991). The coercive environment of the cramped confines of the bus was compounded by the manner in which Lang spoke to respondents – employing an "in your face style," towering over and leaning within 12 to 18 inches of Drayton's face. Lang used this to his advantage, eliminating any opportunity respondents might have had to refuse consent.

B. Passengers' Responses.

Several aspects of the respondents' behavior deserve comment. Brown was asked, "Do you mind if I check your

person for weapons?" The phrasing of this indirect question[34] is conveniently such that, no matter how the subject answers, it can be interpreted by the testifying officer as affirmative consent. That is, if Brown had said, "Yes," it could be interpreted as "Yes, you may check me for weapons." Conversely, if he had answered, "No," it could be interpreted as "No, I don't mind."

Also, the answer Brown reportedly gave, "Sure," is a response entirely dependent upon intonation for interpretation.[35] The government's brief states that Brown said, "yes," Govt. Br. 18. That is wrong.

Unlike Brown, Drayton never responded verbally to the officer. His only reported response was to lift his hands off his lap. That act is consistent with his simply getting out of Lang's way – given that Lang testified he asked for permission and then proceeded, without waiting on an

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[34] Psycholinguistic research has demonstrated that the manner in which indirect requests are interpreted depends on the context. *See, e.g.*, H.H. Clark, *Responding to indirect speech acts*, 11 Cognitive Psychol. 430 (1979); R.W. Gibbs, *Do people always process the literal meaning of indirect requests?* 9 J. Experimental Psychol.: Learning, Memory, & Cognition 524 (1983); T. Holtgraves, *Communication in context: Effects of speaker status on the comprehension of indirect requests*, 20 J. Experimental Psychol.: Learning, Memory, & Cognition 1205 (1994); S.D. Kelly et al., *Offering a hand to pragmatic understanding: The role of speech and gesture in comprehension and memory*, 40 J. Memory & Language 577 (1999). A conventional expression like "Do you mind if I check your bag?" is normally interpreted as an indirect request requiring a "yes" response (in this case: "give me permission to search your bag"), rather than as a question about the addressee's willingness to give permission; this is evidenced by the fact that an expression like "Do you mind if I borrow your pencil?" is often uttered by someone who is already holding or using the pencil.

[35] *See* D.L. Bolinger, *Intonation and its uses: melody in grammar and discourse* (1989).

answer – as it is with an indication of permission.[36] This was, at best, "no more than acquiescence to a claim of lawful authority." *Bumper*, 391 U.S. at 549. Under the circumstances, Drayton did everything "reasonable" to ignore the officer, as it would be unreasonable, and unwise, to expect citizens to become confrontative with an officer to communicate that they wish to be left alone. See also *United States* v. *Berry*, 670 F.2d 583, 596 (5th Cir. Unit B Mar. 1982) (stating that acquiescence to an officer's demands cannot, of course, substitute for free consent). See *supra* at 3 n.4.

C. Any Consent Can Not Overcome The Taint Of The Illegal Seizures.

The government argues that "a defendant who has been 'seized' may nonetheless voluntarily and validly consent to a search." Govt. Br. 32 n.5. This assumes, however, that the seizure itself is a legal seizure. The government is incorrect in suggesting that respondents' purported consents could be voluntary even if they were "seized" during this encounter. *Any* seizure of respondents in this case was *unconstitutional* because the officers did not have a warrant, probable cause, or reasonable suspicion. When a seizure is unconstitutional, any "consent" to search obtained as a fruit of that illegal seizure is tainted and involuntary. *Bostick*, 501 U.S. at 433-34; *Florida* v. *Royer*, 460 U.S. 491, 507-08 (1983) ("Because we affirm the Florida District Court of Appeal's conclusion that Royer

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[36] Attribution studies also reflect that a nonactor is more likely to conclude that an actor's behavior was voluntary rather than the product of situational pressures. *See* Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process, in Advances in Experimental Social Psychology* 173, 184 (Leonard Berkowitz ed., 1977) (finding that observers consistently "assumed that the particular subject's obedience reflected his distinguishing personal dispositions rather than the potency of situational pressures and constraints acting upon all subjects"); *see also* Dorothy Kagehiro, *Perceived Voluntariness of Consent to Warrantless Police Searches* 18 J. Applied Soc. Psychol. 38, 40 (1981).

was being illegally detained when he consented to the search of his luggage, we agree that the consent was tainted by the illegality and was ineffective to justify the search."); cf. *United States* v. *Mendenhall*, 446 U.S. 544, 558 (1980) (because there was no impermissible seizure, "it cannot be contended that [Mendenhall's] apparent consent to the subsequent search was infected by an unlawful detention"). See also *Bostick*, 501 U.S. at 433-34 (recognizing that, in a continuous narcotics interdiction on a bus, no attenuation exists between the impermissible seizure and the subsequent grant of consent to search that could possibly cure the antecedent Fourth Amendment violation); *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963) (focusing the admissibility of evidence on whether its seizure was sufficiently attenuated to be purged of the antecedent illegality).

The conclusion the government urges – that a voluntary consent can cure a coincident illegal seizure – would reduce the Fourth Amendment to a dead letter. Such an approach has been soundly rejected in the context of the Fifth Amendment. See *Brown* v. *Illinois*, 422 U.S. 590, 605 (1975) (holding the administration of *Miranda* warnings alone to be insufficient attenuation to purge the taint of an unconstitutional arrest). Under the Fourth Amendment regime the government urges, the police could physically detain people on the street and ask for permission to conduct a search. If the detainees were determined to have voluntarily consented to the search, despite the blatantly unlawful seizure, whatever evidence of wrongdoing the police gathered from the random detention would be admissible in a court of law.

The case cited by the government, *United States* v. *Watson*, 423 U.S. 411 (1976), is not to the contrary. In *Watson*, this Court held that Watson's arrest was *constitutional* under the Fourth Amendment because it was supported by probable cause and made in accordance with governing statutes. *Id.* at 415, 424. The Court therefore concluded that "Watson's

consent to the search of his car was not the product of an illegal arrest." *Id.* at 424.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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